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No. 80-2165

In The

Supreme Court of the United States

October Term, 1980

JAMES M. MURPHY,
District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

vs.

EUGENE L. HUNT,

Appellee.

ON APPEAL FROOM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPELLEE'S BRIEF ON THE MERITS

BENNETT G. HORNSTEIN

Douglas County Public Defender's Office
306 Douglas County Hall of Justice
Omaha, Nebraska 68183
Telephone: (402) 444-7683 or (402) 391-3712

Counsel for Appellee

COCKLE PRINTING CO., 2511 Douglas St., Omaha 68102

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Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N. Y. U. L. Rev. 67 (1963) 20

W. Blackstone, *Commentaries on the Laws of England* (4th Ed. 1770) 18

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W. Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 67 A. B. A. J. 290 (1981) 40, 43

W. Burger, *Law Day at the White House*, 65 A. B. A. J. 929 (1979) 43

W. Burger, *The State of the Federal Judiciary—1979*, 65 A. B. A. J. 358 (1979) 31

Chafee, *Documents on Fundamental Human Rights* (1963) 8

Comment, *Forcible Rape and the Right to Bail*, 17 San Diego L. Rev. 1061 (1980) 28, 32

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C. Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959 (1965) 9, 10, 11, 12

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National Bureau of Standards, *Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study* (1970) 31

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Pines, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 Colum. J. of Law and Soc. Probs. 394 (1973) 21

Plaintiff's brief in Bellamy v. Judges of New York City, (App. Div. N. Y. S. Ct., 1st Dep't. 1972) 3, reprinted in H. Herman & H. Haft, Prisoners Rights Sourcebook (1973) 20

Rankin, *The Effect of Pretrial Detention*, 39 N. Y. U. L. Rev. 641 (1964) 20

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Story, *Commentaries on the Constitution of the United States* (1833) 7, 12

J. Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Wis. L. Rev. 441 (1978) 33

A. de Toqueville, *Democracy in America* (R. Hefner, ed. 1956) 41

L. Tribe, *American Constitutional Law* (1978) 24

The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City, 8 Crim. L. Bull. 459 (1972) 20

P. Wald, *The Right to Bail Revisited: A Decade of Promise Without Fulfillment* in S. Nagel (ed.), *The Rights of the Accused* (1972) 20

SUMMARY OF ARGUMENT

I. This appeal seeks to overturn the decision of the United States Court of Appeals in *Hunt v. Roth*, 648 F. 2d 1148 (8th Cir. 1981), which found that the denial of pretrial bail to appellee Hunt by appellant state Judge Murphy under a 1978 Nebraska Constitutional amendment rendering nonbailable "sexual offenses involving penetration by force or against the will of the victim . . . where the proof is evident or the presumption great", violated Hunt's rights under the Eighth Amendment Excessive Bail Clause and the Fourteenth Amendment. This is the first case presenting to the Court the questions whether the Eighth and Fourteenth Amendments guarantee a fundamental right or liberty interest in pretrial bail in criminal cases, whether such right is protected against legislative abuse, and whether the foregoing Nebraska law violates the Excessive Bail Clause, as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

II. *Duncan v. Louisiana*, 391 U. S. 145, 147-150 (1968) specified a number of tests for determining whether a right extended to criminal defendants by the Bill of Rights also binds the states under the Fourteenth Amendment. The essence of these tests requires that such a right be "fundamental in the context of the criminal processes maintained by the American States".

The fact that the Eighth Amendment states only that "(e)xcessive bail shall not be required", and does not explicitly guarantee a right to bail protected against legislative abuse, does not under the decisions of this Court, the Ninth Amendment, and the intention of the framers of the Bill of Rights preclude this Court from finding that such right is implicit in the Excessive Bail Clause as indispensable to the enjoyment of the explicit right.

This Court has employed several criteria in determining what are to be deemed fundamental explicit or implicit rights. Under these criteria, a right to pretrial bail in criminal cases which is protected against unreasonable legislative denial qualifies as a fundamental right because bail is an interest explicitly protected by the Eighth Amendment, the language of its Excessive Bail Clause is derived from the English Bill of Rights which was the latest in a series of remedies directed at hundreds of years of bail abuse in a governmental system not permitting constitutional restraints on legislative action, a primary intention of the framers of the American Bill of Rights was to control legislative power, bail has been mandated in noncapital cases by the overwhelming majority of American jurisdictions continuously since the founding of the nation, empirical studies and court decisions establish that bail is necessary to ensure the exercise of other fundamental rights, and the well-reasoned opinions of this and other courts and commentators establish that absent an implicit right to bail guaranteed against legislative abuse any remaining right to bail would be eviscerated.

III. Even should this Court conclude that bail is not a fundamental right requiring invocation of a strict scrutiny equal protection-due process testing of the challenged 1978 Nebraska bail amendment, the Court must, to remain consistent with its decisions citing other protected interests, find that pretrial bail in criminal cases is an important enough individual liberty interest to mandate evaluation of the Nebraska law under the Court's intermediate scrutiny rules.

Conceding *arguendo* that Nebraska's intention to prevent repetition of the crime of rape by defendants charged with rape during a period of pretrial release is an impor-

tant state objective, Nebraska's chosen means of doing so by denying bail to all defendants merely accused of rape is not substantially related to the achievement of its objective, as required by the "close-fit" technique of intermediate scrutiny, because there is no evidence that any significant number of accused rapists will commit rape during a period of pretrial release. Recidivism statistics generally reflecting that *some convicted* rapists have in the past committed rape or may at some time in the future repeat their crimes do not support Nebraska's assumption that any *significant number* of defendants merely *charged* with rape will commit rape *during the limited period while free on pretrial bail.* Furthermore, Nebraska's having conditioned denial of bail upon a finding that the "proof is evident or the presumption great" does not save the law from unconstitutionality because this standard is undefined by Nebraska, has been assigned many different definitions by other jurisdictions, and even assuming that it requires the State to establish a high probability of a defendant's guilt, there is no logical correlation or statistical evidence that a defendant who is probably guilty of a past rape presents any risk of committing rape while free on pretrial bail.

In addition to failing the Court's intermediate scrutiny "close fit" test, the 1978 Nebraska bail amendment also violates the intermediate scrutiny prohibition against irrebuttable presumptions by providing for no inquiry into individual dangerousness and no opportunity for a defendant merely charged with rape to show that he is not among the class of defendants who would commit rape if granted pretrial release. The State's contention that no such presumption exists because of the alleged discretion of trial courts to grant bail release even after finding that the

"proof is evident or presumption great" is refuted by a contrary interpretation of that language by the Nebraska Supreme Court.

Nebraska cannot convincingly argue that no other practical alternatives less restrictive of the individual interest in pretrial liberty are available to accomplish its objective, because many models of such legislation have been implemented in other jurisdictions and have been suggested by other authorities.

IV. This case presents to this Court a supreme test of the Bill of Rights and the rule of law in the face of a challenge by an irrational majority of the people of the State of Nebraska who, but for the intervention of the Court of Appeals below and this Court of last resort, would deny the guaranteed rights of an unpopular minority.

ARGUMENT

I. Introduction: Statement of Issues

This appeal seeks to overturn the decision of the United States Court of Appeals in *Hunt v. Roth*, 648 F. 2d 1148 (8th Cir. 1981), which found that the denial of pretrial bail to appellee Eugene Hunt by appellant State Judge Murphy (hereinafter "the State" or "Nebraska") under a 1978 Nebraska constitutional amendment rendering nonbailable "sexual offenses involving penetration by force or against the will of the victim . . . where the proof is evident or the presumption great," violated Hunt's rights under the Eighth and Fourteenth Amendments. The appeal thereby presents to the Court for the first time in nearly 200 years since enactment of the Excessive Bail Clause of the Eighth Amendment and in more than 100 years since passage of the Due Process Clause of the Four-

teenth Amendment the questions whether those clauses guarantee a fundamental right or liberty interest in pretrial bail in criminal cases, whether such right is protected equally against legislative and judicial abuse, and whether a state bail restriction such as Nebraska's violates those clauses and the Equal Protection Clause of the Fourteenth Amendment. *Hunt v. Roth*, 648 F. 2d 1148, 1155 (8th Cir. 1981); *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106, 112 (1979); *United States v. Edwards*, D. C. App., 430 A. 2d 1321, 1325, 1365 n. 1 (1981); *Sistrunk v. Lyons*, 646 F. 2d 64, 66 (3d Cir. 1981). A commentator has noted that "(no) constitutional right of the accused has received less judicial clarification than the Eighth Amendment prohibition against excessive bail". J. Cook, *Constitutional Rights of the Accused—Pretrial Rights* 463 (1972).

II. Pretrial bail protected against unreasonable state legislative denial is a fundamental right guaranteed by the Excessive Bail Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth.

Mr. Justice White's opinion of the Court in *Duncan v. Louisiana*, 391 U. S. 145, 147-150 (1968) specified a number of tests for determining whether a right extended to criminal defendants by the Bill of Rights is incorporated in the Fourteenth Amendment to also bind the states. Those tests include whether the suggested right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, . . . is basic in our system of jurisprudence, . . . a fundamental right essential to a fair trial, . . . fundamental to the American scheme of justice, . . . a procedure necessary to an Anglo-American regime of ordered liberty, . . . not necessarily fundamental to fairness in every criminal system that might be imagined but . . . fundamental in the con-

text of the criminal processes maintained by the American States." Under all of the criteria applied by the Court, a right to pretrial bail arising out of the Eighth Amendment Excessive Bail Clause and guaranteed against legislative abuse satisfies these tests of a fundamental right.

A. The Eighth Amendment's failure to state an explicit right to bail does not preclude the existence of such an implicit right.

The State of Nebraska first argues that had the framers intended the Excessive Bail Clause to establish a right to bail, they would have expressly so stated, rather than only providing: "Excessive bail shall not be required, . . ." While conceding that Eugene Hunt's argument for an implicit right to bail "may have a degree of logical appeal . . .", the State contends that the absence of an explicit right reflects a lack of intent to create it. Appellant's Brief on the Merits, 12-13.

Mr. Chief Justice Burger's recent plurality opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U. S. 555, 579-80, 100 S. Ct. 2814, 2828-29, 65 L. Ed. 2d 973, 991 (1980), holding ". . . the right to attend criminal trials is implicit in the . . . First Amendment" is only one of the latest in a long line of decisions rejecting the State's argument that only explicit rights may be recognized. His opinion pointed out that "certain inarticulated rights are implicit in enumerated guarantees" and "have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined", citing as examples the rights of association, privacy, travel, and to be presumed innocent and judged by proof beyond a reasonable doubt in a criminal trial. In adding to this incomplete list the right to attend criminal trials, the *Richmond* opinion found that without it "important aspects of freedom of speech and of the press could be eviscerated."

The Supreme Court's authority, indeed constitutional obligation, to identify and protect unspecified fundamental rights was intended by James Madison in introducing the Ninth Amendment providing: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". See 1 *Annals of Cong.* 439 (Gales and Seaton ed. 1834). Justice Story recognized this intention in later writing that the "Bill of Rights presumes the existence of a substantial body of rights not specifically enumerated but easily perceived in the broad concept of liberty so numerous and so obvious as to preclude listing them". 3 Story, *Commentaries on the Constitution of the United States* 715-16 (1833). The leading modern statement of this principle is contained in Mr. Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961), which asserted that this ". . . liberty (guaranteed by the Due Process Clause) is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion . . . and so on. It is a rational continuum which broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . ."

Based upon the following discussion, Eugene Hunt submits that like so many other rights identified by this Court, even though not explicitly stated in the Bill of Rights, pretrial bail guaranteed against legislative abuse is an implicit fundamental right under the Excessive Bail and Due Process Clauses.

B. The right to bail has deep historical roots in English law.

One criterion applied by the Court to identify a fundamental right protected by the Due Process Clause is whether it can be traced to early English law. See *Dun-*

e.g. v. Louisiana, 391 U.S. 145, 151 (1968) (jury trial "carried impressive credentials traced by many to Magna Carta"); *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (guarantee against unreasonable searches "enshrined in basic constitutional documents of English-speaking peoples"); *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (right to speedy trial "at the very foundation of our English law heritage"). Bail easily satisfies this criterion.

A recent historical study of Anglo-American bail has traced such a right as far back as seventh century England.[1] W. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 34 (1977). This early English bail system had quite liberal and sophisticated rules, permitting the posting of property by the accused or the use of third party sureties, both before and after conviction, even in homicide cases. "The general purpose of the early Anglo-Saxon (bail) code was to restrain private vengeance until resort could be had to a public tribunal". Id. at 35-36. Because of repressive measures by the Plantagenets suppressing bail and other rights, Magna Carta in 1215 guaranteed that "no freeman shall be arrested or detained in prison . . . unless . . . by the law of the land". 1 Chafee, *Documents on Fundamental Human Rights*, 249, 251 (1963). Later bail abuses by sheriffs resulted in the first Statute of Westminster in 1275 and other statutes eliminating their discretionary powers and specifying bailable and nonbailable offenses. Unjustified pretrial detention

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1 A right to bail has been reported to have existed as long ago as ancient Greece. Plato is quoted as follows: "The prosecutor, in a murder charge, must at once demand bail from the defendant, and the latter shall provide three substantial securities as approved by the court. . . . If a man be unwilling or unable to provide these sureties, the court must bind and keep him, and produce him at the trial". R. Brumbaugh. *Plato for the Modern Man* 66 (1972).

of knights by Charles I led to adoption of the Petition of Right in 1628 clarifying application of Magna Carta to pretrial detention and enforcing the Statute of Westminster. When the Petition of Right was thereafter frustrated by King's Bench judges' engaging in procedural delays in granting release on bail, these loopholes were plugged by detailed release procedures spelled out in the Habeas Corpus Act of 1679. After judges then began setting prohibitively high bail, this final abuse was cured by the Bill of Rights of 1689 providing "That excessive bail ought not to be required". For more detailed summaries of this English history of bail, see Duker, supra, at 34-66, and C. Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 965-968 (1965).

Facts clearly emerging from this historical review are that "(t)he roots of bail extend deep into English law" (Duker, supra, at 119), and "(t)he right to be bailed in certain cases is as old as the law of England itself . . ." 1 J. Stephen, *A History of the Criminal Law of England*, 233 (1883). Another "is that relief against abusive pretrial imprisonment was one of those fundamental aspects of liberty which was of most concern during the formative era of English law". Foote, supra, at 968. A final historical observation might be that the English system succeeded in devising a remedy for each successive bail abuse imposed by various government officials.

C. The right to bail was deemed important in the American colonies and in the early years of the United States.

A second consideration invoked by this Court in identifying a fundamental right is whether its importance was recognized in the early years of this nation. See *Duncan v. Louisiana*, 391 U. S. 145, 152, 153 (1968) ("Jury trial

came to America with English colonists and received strong support from them. . . . (T)he constitution of every State entering the Union . . . in one form or another protected the right . . . in criminal cases."); *Klopfer v. North Carolina*, 386 U. S. 213, 225 (1967) (importance of speedy trial "evidenced by its guarantee in the constitutions of several of the States of the new nation"); *In re Oliver*, 333 U. S. 257, 266-267 (1948) (most early state constitutions protected public trial). Judged by this standard, bail must also be regarded as fundamental.

Many colonial charters, beginning with the Massachusetts Body of Liberties of 1641, established a right to pretrial bail in a broad range of criminal cases. As early as 1682, the Frame of Government of Pennsylvania provided that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption great." W. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 80 (1977); C. Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 974-975 (1965). This Pennsylvania right to bail was adopted nearly verbatim by the Continental Congress in the Northwest Ordinance of 1787[2], by Congress in the Judiciary Act of 1789 (1 Stat. 91 No. 33); and, as we shall later see, by the constitutions and in a few instances the statutes of the overwhelming majority of states, which have maintained it to this day.

The historical debate over whether the Excessive Bail Clause was intended to restrain only judicial, or both judicial and legislative abuse arises out of the ambiguity of the clause's simple language "Excessive bail shall not be

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2 An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, Art. II, 22 *Journals of the Continental Congress* 334 (1787), reprinted in 1 Stat. 50 n. (a).

required . . . ", the early history of the clause, and the absence of congressional debate clarifying its meaning.[3] The leading recent proponent of the narrow reading is Duker, a nonlawyer, who generally argues that because this language originated with the English Bill of Rights of 1689, which was only intended to bind judges, as well as the Declaration of Rights of 1776 in Virginia, which like some other colonies, early states, and the federal government spelled out specific rights to bail only by statute, the use of the narrow language of the Excessive Bail Clause could only have been intended to leave legislatures free to designate nonbailable crimes. Duker, supra, at 77-83.

The chief representative of the expansive construction of the Excessive Bail Clause is Professor Foote, a lawyer, who contends that the language must be read against the backdrop of hundreds of years of English bail abuses and remedies, the colonial experience with liberalizing bail, and the absence of dispute about bail between England and the colonies, which probably explains the minimal attention bail received in the congressional deabtes. He further cites Madison's statements in support of the Bill of Rights, stressing the need to go beyond the English system by restraining the legislative branch . . . "for it is the most powerful, and most likely to be abused, because it is under the least control". 1 *Annals of Cong.* 436-37 (1789-1791). Foote attributes the narrow language of the Excessive Bail Clause to the inadvertance of George Mason, a nonlawyer who had a limited understanding of

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3 This controversy was pressaged by the only comment appearing in the congressional debate on the Excessive Bail Clause: "Mr. Livermore.—The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges?" 1 *Annals of Cong.* 754 (1789-91).

the English bail system and borrowed the language of the English Bill of Rights and Virginia Declaration assuming it "alone was sufficient to epitomize the protections evolved from the long struggle against pretrial imprisonment". Foote, supra, at 975-989.[4]

While arguing from his historical perspective against the existence of a right to bail, Duker nevertheless concedes that ". . . the majority of the representatives of the American people at least have, from the first American Congress, found it desirable to establish a right to bail in non-capital cases pending trial". *Duker*, supra, at 101. Even if the Court accepts *Duker's* narrow historical interpretation of the Excessive Bail Clause, this does not preclude a finding that the clause now implies a right to bail secure against legislative abuse, for as we shall see in the following discussion, early history is only one, and not the most important, criterion to be considered in identifying a fundamental right in criminal cases.[5]

D. The right to bail has received continuous legal protection from the founding of the Nation to contemporary times.

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4 Early nondecisional support for Foote's thesis that the Excessive Bail Clause was intended to restrain legislative as well as judicial abuse is contained in Justice Story's assertion that "(i)t was, however, adopted as an admonition to *all departments* of the national government to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts". 2 J. Story, *Commentaries on the Constitution of the United States*, 610-11 (2d ed. 1851) (emphasis added).

5 One shortcoming of the recent decisions rejecting a fundamental Eighth Amendment right to bail is that they have been based almost exclusively on early historical analysis and largely ignored the Court's other criteria for recognizing such a right. *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106, 110-113 (1979); *United States v. Edwards*, D. C. App., 430 A. 2d 1321, 1325-1331 (1981).

Another, and perhaps the most important, factor relied upon by the Court in isolating a fundamental right, especially in criminal cases, is the extent to which it has been implemented as the nation has developed. See *Duncan v. Louisiana*, 391 U. S. 145, 150 (1968) (". . . every American State . . . uses the jury extensively . . . (and no state) has undertaken to construct such a system (without juries))"; *In re Oliver*, 333 U. S. 257, 273 (1948) (public trials are a "universal requirement of our federal and state governments"). *Duncan*, the leading modern demision stating the tests for determining a fundamental right in criminal proceedings, rejects older standards demanding for example, "if a civilized system could be imagined that would not accord the particular protection" in favor of an inquiry asking instead whether a right "is fundamental in the context of the criminal processes maintained by the American States". 391 U. S. 145, 149-150 n. 14. This test requires a primary focus on how a right has actually developed and been recognized, rather than how it may have existed in England or the United States at or prior to adoption of the Bill of Rights. Bail also easily satisfies this test.

As previously mentioned, prior to or shortly after enactment of the Eighth Amendment, the federal government and vast majority of the states adopted laws, in some cases statutory but in most constitutional, guaranteeing a right to bail in all noncapital cases.[6] Interestingly,

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6 Recognition of the pervasiveness of a right to bail in noncapital cases throughout American history appears in *United States v. Motlow*, 10 F. 2d 657, 659 (7th Cir. 1926) (Butler, Circuit Justice), quoting Chief Justice Mason of the Iowa Supreme Court in *Hight v. United States*, Morris 407, 409, 43 Am. Dec. 111, 112 in discussing the noncapital bail requirement of the Northwest Ordinance of 1787: "This is no new provision, but is in express terms incorporated into the con-

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this appeal is scheduled to be argued and decided in 1982, which marks the 300th anniversary of adoption of the original bail clause guaranteeing such right in the 1682 Frame of Government of Pennsylvania, whose language according to one recent summary is now perpetuated nearly verbatim in the constitutions of 36 American states and the statutes of several others. *Petition of Humphrey*, Okl. Cr., 601 P. 2d 103, 108-111 (1979) (appendix listing state bail provisions). As reflected in this summary, two of the remaining states have Excessive Bail Clauses like the Eighth Amendment, and five including Nebraska have since 1970 amended their constitutions with the apparent intention of permitting some form of preventive detention. With the exception of the District of Columbia, which has enacted the most elaborate preventive detention legislation, bail in noncapital cases remains a federal right as it has since the Judiciary Act of 1789. 18 U. S. C. #3146, Fed. R. Crim. P. 46 (a); D. C. Code 1973, #23-1322.

Eugene Hunt suggests that the reason there has been so little judicial consideration of the existence of a right to bail and that it has taken 200 years since passage of the Eighth Amendment for this issue to now reach the Court is that until the last decade when a few jurisdictions began enacting unprecedented bail restrictions, criminal defendants throughout the United States had enjoyed a right to pretrial bail in noncapital cases and therefore had no need to litigate whether such right was constitutionally protected.

E. The right to bail has been recognized as fundamental by this Court's own decisions.

(Continued from previous page)

stitutions of at least one-half of the states of the Union and is the rule of action in all the rest. It is merely declaratory of the common law of the United States".

Another criterion cited by this Court in recognizing a fundamental right is its own descriptions of it as such. *Duncan v. Louisiana*, 391 U. S. 145, 153-154 (1968) (jury trial has "an importance frequently recognized in the opinions of this Court"); *Gideon v. Wainwright*, 372 U. S. 335, 343-345 (1963) (the Court's "own well-considered precedents" required right to counsel). A right to bail also generally meets this criterion, but it is to a great extent because of conflicting dicta in several of the Court's opinions that this appeal is now before it for final resolution of whether such a right is to be designated as fundamental.

Most recently, Mr. Justice Blackmun's opinion of the Court in *Schilb v. Kuebel*, 404 U. S. 357, 365 (1971) stated that "(b)ail . . . is basic to our system of law . . . and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment". See the same language regarding the fundamental nature of bail in *Herzog v. United States*, 75 S. Ct. 349, 351 (1955) (Douglas, Circuit Justice). Earlier, Mr. Chief Justice Vinson's opinion of the Court in *Stack v. Boyle*, 342 U. S. 1, 4 (1951) asserted: "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. . . ."

Stack, supra, and *Carlson v. Landon*, 342 U. S. 524 (1952), decided during the same term, have for the past 30 years been the primary decisions fueling the debate over whether the Excessive Bail Clause safeguards a right to bail against legislative abuse. *Stack* considered the habeas corpus excessive bail claims of 12 Communist Party

members whose bail had each been set below at $50,000 following federal Smith Act indictments carrying maximum penalties of five years imprisonment and a $10,000 fine. Conceding that this bail was higher than usual for crimes carrying such penalties, the Government argued that the high bail was justified by the prior bail forfeitures of four other defendants convicted of the same offenses. In remanding the cases for individualized consideration of each defendant's release on bail, Mr. Chief Justice Vinson's opinion of the Court contained the language quoted above which has since been frequently cited in support of a general constitutional right to bail.

Carlson, supra, upheld the Attorney General's discretionary administrative denial of bail under the Internal Security Act of 1950 to alien Communists pending deportation proceedings. The Court's five-man majority opinion, joined by Chief Justice Vinson, who had written the Court's opinion in *Stack*, asserted that the Excessive Bail Clause of the English Bill of Rights was not "thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail", when it was included into our Bill of Rights "nothing was said that indicated any different concept," the "Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed . . ." (citing capital cases), and "the very language of the Amendment fails to say all arrests must be bailable". 342 U. S. 524, 545-46.

The *Carlson* dissenters summarized the chief arguments since heard in support of the application of the Excessive Bail Clause to legislative action. Mr. Justice Burton argued that the "Amendment cannot well mean that, on the one hand, it prohibits . . . bail so excessive in

amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing". 342 U. S. 524, 569.[7] Mr. Justice Black added in dissent that the ". . . Amendment is thus (by the majority's interpretation of it to do 'no more than protect a right to bail which Congress can grant and . . . take away') reduced below the level of a pious admonition". In answer to the argument that the excessive bail prohibition of the English Bill of Rights had not applied to legislative abuse, he contended that "our Bill of Rights was written . . . to guarantee Americans greater freedom than had been enjoyed by their ancestors who had been driven from Europe by persecution".[8] 342 U. S. 524, 556-57.

The Court of Appeals below distinguished *Carlson* from this case because it had involved a denial of bail in a noncriminal context, and the *Carlson* majority had limited its holding by stating that "the Eighth Amendment does not require that bail be allowed *under the circum-*

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7 Earlier support for this view is found in the opinion of Mr. Justice Butler as Circuit Justice in *United States v. Motlow*, 10 F. 2d 657, 659 (7th Cir. 1926), admitting defendants to bail on appeal after National Prohibition Act convictions:

> The Eighth Amendment provides that 'excessive bail shall not be required'. This implies, and therefore safeguards the right to give bail at least before trial. The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given. The provision forbidding excessive bail would be futile if magistrates were left free to deny bail.

8 Another argument suggested by language in this Court's decision is that the choice by Congress to join together in the Eighth Amendment both the Excessive Bail and the Cruel and Unusual Punishment Clauses, the latter not stating, but according to the more extensive congressional debates, intended to restrain legislative as well as judicial action, evidences the framers' intention to do likewise in the case of bail. See *Ingraham v. Wright*, 430 U. S. 651, 664-66 (1977).

stances of these cases". It also cited *Carlson's* requirement that the Attorney General's denial of bail could not be arbitrary and was subject to judicial review. *Hunt v. Roth*, 648 F. 2d 1148, 1161-62 (1981). See also, Note, *Preventive Detention Before Trial*, 79 Harv. L. Rev. 1489, 1499 (1966).

While the *Carlson* majority and other courts have also pointed to the traditional capital crimes exception in arguing that the Excessive Bail Clause is not binding on legislatures and does not confer an absolute right to bail, these arguments are easily answered by history and other decisions. See also, *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106, 110-113 (1979). The capital crimes exception antedates the Bill of Rights and was based exclusively on the assumption, inapplicable to noncapital offenses, that no bail could assure the appearance of a defendant facing a possible punishment of death. 4 W. Blackstone, *Commentaries on the Laws of England*, 293-294 (4th Ed. 1770); *United States v. Kennedy*, 618 F. 2d 557, 559 (9th Cir. 1980).

These decisions and the State in this appeal also contend that the capital crimes exception negates an "absolute" right to bail, for which the State assumes Eugene Hunt is arguing. Appellant's Brief on the Merits, 12, 17, 23. Of course, no right, fundamental or otherwise, is absolute. For example, jury trial is not required for petty offenses. *Duncan v. Louisiana*, 391 U. S. 145, 160 (1968); counsel is not required for defendants in criminal cases where there is no sentence of imprisonment. *Argersinger v. Hamlin*, 407 U. S. 25, 37 (1972); and even the most preferred fundamental right, First Amendment speech, has its exceptions for certain language which defames, is obscene, interferes with security during war, is merely com-

mercial, or incites to violence. *Young v. American Mini Theatres*, 427 U. S. 50, 65-70 (1976). Eugene Hunt is in fact only arguing here for a fundamental right to pretrial bail guaranteed against *unreasonable* denial, which right in order not to be eviscerated must prevent unreasonable *legislative* as well as judicial denial of bail.[9]

F. The right to bail is necessary to protect the exercise of other fundamental rights.

A last criterion applied by the Court to identify a fundamental right is whether it is necessary to protect other rights. *Gideon v. Wainwright*, 372 U. S. 335, 343-44 (1963) (counsel "essential to a fair trial"); *Mapp v. Ohio*, 367 U. S. 643, 656 (1961) (exclusionary rule necessary "to compel respect for the constitutional guaranty" against unreasonable searches); *Coleman v. Alabama*, 399 U. S. 1, 8-9 (1970) (pretrial counsel required to protect other Sixth Amendment rights); *Duncan v. Louisiana*, 391 U. S. 145, 150 (1968) ("criminal . . . framework . . . and procedures . . . complement . . . and have developed . . . in reliance upon jury trial"). Bail also satisfies this final consideration.

Empirical studies have demonstrated that defendants not released on bail plead guilty more often, have a higher rate of conviction, and receive more prison sentences than those released on bail. After evaluating all other factors which might explain these disparities, the studies con-

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9 For recent opinions of judges of this and other federal courts agreeing with Hunt and the Court of Appeals below that the Eighth Amendment's prohibition against excessive bail must also proscribe unreasonable denial of bail, including denial by legislatures, see *United States v. Edwards*, D. C. App., 430 A. 2d 1321, 1365-68 (Mack, J., dissenting); *Trimble v. Stone*, 187 F. Supp. 483, 484-85 (D. D. C. 1960); *Sellers v. United States*, 89 S. Ct. 36, 38 (1968) (Black, Circuit Justice); *United States ex rel. Goodman v. Kehl*, 456 F. 2d 863, 868 (2d Cir. 1972).

cluded that the differences could only be explained by the defendants' status as detained or free on bail. Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N. Y. U. L. Rev. 67 (1963) (59 percent of those released but only 23 percent of detainees had charges dismissed or were acquitted, 49 percent of those freed as against 79 percent of those held pled guilty, and 21 percent of those liberated on bail compared to 96 percent of those detained received prison sentences); Plaintiff's brief in *Bellamy v. Judges of New York City*, (App. Div., N. Y. S. Ct., 1st Dep't. 1972) 3, reprinted in H. Herman & H. Haft, *Prisoners Rights Sourcebook* 134-162 (1973) ("A first offender who is detained in lieu of bail is more than three times as likely to be convicted and almost twice as likely to get a prison sentence as a recidivist with more than ten prior arrests who is released".) See also, Rankin, *The Effect of Pretrial Detention*, 39 N. Y. U. L. Rev. 641 (1964); *The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City*, 8 Crim. L. Bull. 459-467 (1972). The foregoing studies are cited and discussed in P. Wald, *The Right to Bail Revisited: A Decade of Promise Without Fulfillment*, in S. Nagel (ed.) *The Rights of the Accused*, 178 201 n. 2 (1972). See also, Note, *Preventive Detention: An Empirical Analysis*, 6 Harv. C. R.—C. L. L. Rev. 289, 347 (1971). Certainly, if the results of these studies are correct, they graphically demonstrate that defendants not released on bail are denied fair trials in the sense that they are precluded from the same opportunity for favorable case results enjoyed by those freed on bail.

This gross disparity of favorable outcomes of cases of defendants detained when compared to those released on bail reflects the inability of detainees to exercise many

other fundamental rights dependent on bail. Chief among these is the right to counsel and to prepare a defense. The interdependence of these rights is reflected in a decision like *Bitter v. United States*, 389 U. S. 15, 17 (1967), reversing a conviction because a trial judge's revocation of bail and detention in a distant jail of the defendant who was slightly tardy in returning to Court after a trial recess amounted to impermissible punishment and "an unwarranted burden upon defendant and his counsel in the conduct of the case". The problems faced by a detained defendant in preparing a defense were detailed as follows in *Smith v. Hooey*, 393 U. S. 374, 379-80 (footnote omitted):

> Confined in a prison, . . . his ability to confer with potential defense witnesses, or even to keep track of their whereabouts is obviously impaired. And, while "evidence and witnesses disappear, memories fade, and events lose their perspective", a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time.

See also, *Barker v. Wingo*, 407 U. S. 514, 532-33 (1972).[10]

A few of the other fundamental rights denied to defendants not free on bail include the right to maintain family relationships (*Moore v. City of East Cleveland*, 431 U. S. 94 (1977)); travel (*Shapiro v. Thompson*, 394 U. S. 618 (1969)); association (*NAACP v. Alabama*, 357 U. S.

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10 One observer has explained the much higher frequency of guilty pleas among detainees as follows:

> In light of the personal losses caused by removal from society, the uncertain and often long and brutal pretrial detention period, and the defendants' doubts of acquittal, plea bargaining becomes a defendant's most realistic course. Despite actual innocence, he confesses in order to begin serving a *known*, relatively light sentence in a more humane prison facility.

Pines, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 Colum. J. of Law and Soc. Probs. 394, 398-99 (1973).

449 (1958)); freedom of movement (*Papachristou v. City of Jacksonville*, 405 U. S. 156 (1972)); and privacy (*Roe v. Wade*, 420 U. S. 113 (1973)). As one court recently noted: "The right to be free from excessive bail underlies the entire structure of the constitutional rights enumerated in the Bill of Rights". *United States v. Abrahams*, 604 F. 2d 386, 393 (5th Cir. 1979).

In summary, because bail is an interest explicitly protected by the Eighth Amendment, the language of its Excessive Bail Clause is derived from the English Bill of Rights which was the most recent remedy directed at hundreds of years of bail abuse in a governmental system not permitting constitutional restraints on legislative action, a primary intention of the framers of the American Bill of Rights was to control legislative power, bail has been mandated in noncapital cases by the overwhelming majority of American jurisdictions continuously since the founding of the nation, empirical studies and court decisions establish that bail is necessary to ensure the exercise of other fundamental rights, and the well-reasoned opinions of this and other courts and commentators establish that absent an implicit right to bail guaranteed against unreasonable legislative and judicial denial any remaining right to bail would be eviscerated, Eugene Hunt urges the Court to declare such right implicitly fundamental and binding on the states under the Excessive Bail Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth.

III. Whether subjected to strict or only intermediate scrutiny, the 1978 bail amendment to the Nebraska Constitution must be found violative of Eugene Hunt's rights under either or both the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

Until recently, the Court has adhered to a fairly rigid two-tier standard of review in its equal protection decisions. Where a classification infringes on a fundamental right or involves a suspect class, it is subject to "strict scrutiny". To survive this test, a state carries a "heavy burden of justification" to establish that its challenged classification promotes a compelling state interest and is "tailored" to constitute the least drastic means of effectuating that interest. *Zablocki v. Redhail*, 434 U. S. 374, 388 (1978); *Shapiro v. Thompson*, 394 U. S. 618, 634, 638 (1969); *San Antonio School District v. Rodriguez*, 411 U. S. 1, 16-17 (1973). Where fundamental rights or suspect classes are not implicated, the Court will invoke a "rational basis" or minimal scrutiny test under which the legislative classification will be sustained if it is rationally related to a constitutionally permissible objective. *Williamson v. Lee Optical Co.*, 348 U. S. 483, 491 (1955). In this latter case, the classification will be struck down only if it rests on grounds wholly irrelevant to the achievement of the state's objectives, and it will be upheld if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland*, 366 U. S. 420-425, 426 (1966).

Apparently because invocation of either the strict scrutiny or rational basis test will result in the nearly automatic invalidation or sustaining of a challenged classification (see *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 319 (1976) (Marshall J., dissenting)), and in order to provide more flexibility in equal protection analysis and results, the Court has in recent years evolved an intermediate scrutiny or "sliding-scale" approach by which it balances important but less than compelling government interests against countervailing important but less than fundamental interests of those dis-

advantaged by the classification. It has been suggested that once an important but less than fundamental individual interest has been identified, the requirements of this "middle tier" evaluation are that the challenged classification promote important government objectives and be closely and substantially related to or "fit" such objectives, that the rationale for the classification be currently advanced in the litigation and not supplied by the Court or by afterthought, and that the legal scheme permit rebuttal in individual cases. L. Tribe, *American Constitutional Law* 1082-1099 (1978).

The Court's standards of review in substantive and procedural due process contexts are similar to its equal protection analyses. For example, where fundamental rights are infringed upon, challenged legislation requires a "compelling state interest" and that the law "be narrowly drawn to express only the legitimate state interests at stake". *Roe v. Wade*, 410 U. S. 113, 155 (1973); *Moore v. City of East Cleveland*, 431 U. S. 494, 499 (1977). The sliding scale approach applicable to equal protection has also been followed with regard to due process. In procedural contexts the Court has stated that "due process is flexible and calls for such procedural protections as the particular situation demands". *Morrissey v. Brewer*, 408 U. S. 471, 481 (1972). Again, as with equal protection, the test of what procedures are required in a given situation involves a balancing of the competing interests. The Court has most recently cited the following factors to be considered in identifying procedural due process requirements: (1) the private interest affected; (2) the risk of an erroneous deprivation of such interest with the challenged procedures, and the value of other safeguards; and (3) the government interest, including the burdens

that substitute procedures would entail. *Mathews v. Eldridge*, 424 U. S. 319, 334-335 (1976).

Because of the similarity of the equal protection and due process standards of review, and since the Court itself has had some difficulty in determining which analysis may be applicable in a given situation, sometimes combining both, counsel will hereafter attempt to subject the challenged 1978 Nebraska bail amendment to a combined evaluation, indicating differences in tests where necessary. See *Zablocki v. Redhail*, 434 U. S. 374, 391, 400 (1978) (Stewart and Powell, JJ. concurring). Assuming that a finding of bail being a fundamental right would result in the application of "strict scrutiny" and almost-certain demise of the law under review, and a contrary finding that bail is of little constitutional importance would probably lead to its being automatically sustained under a rational basis test, the following discussion will concentrate on an intermediate scrutiny analysis.

A. Even should the Court decide that pretrial bail in criminal basis is not a fundamental right, it must find that pretrial liberty is of sufficient importance to justify subjecting the 1978 Nebraska bail amendment to at least intermediate constitutional scrutiny.

For the same reasons that Eugene Hunt argued earlier that pretrial bail is a fundamental right, he contends that even if the Court disagrees, it must agree that bail is of sufficient importance to require review of the challenged legislation under at least middle-tier equal protection and due process tests.

In recently upholding the District of Columbia preventive detention law and rejecting the defendant's contention that bail was a fundamental right, *United States v. Edwards*, D. C. App., 430 A. 2d 1321, 1331, 1333-34

(1981) nevertheless found that bail "is an important right" and that "pretrial detention implicates a liberty interest that requires a fair hearing within the mandates of procedural due process". A dissenter in that case appropriately noted that "this case is as much about the constitutional right to liberty as it is about the constitutional right to bail". 430 A. 2d 1321, 1365 (Mack, J. dissenting). "Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action". *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U. S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part). Freedom of a criminal defendant before trial is even more important since *Bell v. Wolfish*, 441 U. S. 520 (1979), holding that while a defendant may not be punished prior to an adjudication of guilt in accordance with due process of law, his pretrial detention under degrading jail conditions to ensure his presence at trial or for other legitimate government purposes does not constitute punishment. The only restraints on the duration of such oppressive pretrial detention, the many prejudicial effects of which have already been detailed, are constitutional and statutory speedy trial limits of little effectiveness. See *Barker v. Wingo*, 407 U. S. 514 (1972), and Neb. Rev. Stat. § 29-1201, et seq., and case annotations thereunder.[11]

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11 Nebraska speedy trial statutes only require a trial to commence within six months after the filing of the prosecutor's information in a felony case. Neb. Rev. Stat. #29-1207. Because felony prosecutions are usually commenced after arrest with the filing of a complaint in a municipal or county (magistrate) court, and the information is not filed in the district court until the defendant is bound over for trial following a preliminary hearing or waiver thereof in the lower court, the six-month speedy trial limit is thereby effectively extended by the several days or weeks intervening between arrest and bindover. Neb. Rev. Stat. # 29-504 and

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Finally, a useful means of judging whether bail rises to a sufficient level of constitutional importance to justify evaluating government encroachments on it under the Court's equal protection or due process intermediate scrutiny rules is to juxtapose bail against some other interests which the Court has found to be important enough to require such analysis; for example: *Hampton v. Mow Sun Wong*, 426 U. S. 88 (1976) (interest of aliens in eligibility for federal competitive civil service); *Reed v. Reed*, 429 U. S. 190 (1976) (interest of women in serving as probate administrators); *Craig v. Boren*, 429 U. S. 190 (1976) (interest of males between ages 18 and 21 in purchasing 3.2% beer); *Trimble v. Gordon*, 430 U. S. 762 (1977) (interest of illegitimate children in inheriting by intestate succession from their fathers); *Vlandis v. Kline*, 412 U. S. 441 (1973) (interest of arguable state resident in obtaining higher education at affordable tuition); and *Stanley v. Illinois*, 405 U. S. 645 (1972) (interest of unwed father in custody of his children).

In the procedural due process area, the Court has found the following interests, among others, entitled to varying degrees of constitutional protection: *Goldberg v. Kelly*, 397 U. S. 254 (1970) (interest of welfare recipient to continued benefits); *Bell v. Burson*, 402 U. S. 535 (1971) (interest of uninsured motorist in retaining driver's license); *Morrissey v. Brewer*, 408 U. S. 471 (1972) (inter-

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29-506. Additionally, the Nebraska speedy trial statutes allow numerous "excluded" periods which can further extend a defendant's pretrial detention substantially beyond the underlying six month limit. See Neb. Rev. Stat. #29-1207 and cases annotated thereunder. These statutes explain the lengthy periods of pretrial detention served by many defendants held without bail during the year following enactment of the challenged 1978 Nebraska bail amendment. See the survey results in E11, J. A. 7-11.

est of parolee in not having parole revoked); *Wolff v. McDonnell*, 418 U. S. 539 (1974) (interest of prisoner in not having good behavior credits revoked); *Wisconsin v. Constantineau*, 400 U. S. 433 (1971) (interest of individual in not having name publicly posted as excessive drinker); *Perry v. Sindermann*, 408 U. S. 593 (1972) (interest of college professor in having teaching contract renewed); *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969) (interest of debtor in avoiding prejudgment wage garnishment); *Fuentes v. Shevin*, 407 U. S. 67 (1972) (interest of debtor in avoiding prejudgment replevin of household goods under conditional sale); and *Goss v. Lopez*, 419 U. S. 565 (1975) (interest of high school students in not being suspended).

Certainly, if the foregoing largely economic and convicted criminals' interests, based in most cases only upon government statutory or contract "entitlements", require intermediate scrutiny of government infringements upon them and the application of procedural safeguards, pretrial bail in criminal cases, a liberty interest of presumptively innocent persons which is explicitly guaranteed by the Bill of Rights, is entitled to at least the same degree of protection.[12]

B. While preventing the repetition of serious sexual crimes is an important governmental interest, Nebraska's choice to do so by denying bail to all defendants merely charged with such offenses where the proof is evident or presumption great is not tailored to carry out such objective, and it thereby unnecessarily infringes upon their constitutionally-protected interest in pretrial liberty.

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12 One recent commentator who supports the legislation in this case nevertheless concedes that denial of bail arguably involves a sufficient loss of personal liberty to trigger intermediate scrutiny analysis. Comment, *Forcible Rape and the Right to Bail*, 17 San Diego L. Rev. 1061, 1085-86 (1980).

The only expressed legislative purpose and the sole rationale advanced by the State of Nebraska in this litigation for the 1978 bail amendment is "the protection of society from repetition of these types of heinous crimes". Appellant's Brief on the Merits 28; E10 (Legislative History of LB 553) 08925, 25-26.[13] See *Hunt v. Roth*, 648 F. 2d 1148, 1162 (8th Cir. 1981). Eugene Hunt concedes that forcible rape is a serious crime and that the State of Nebraska has an important general governmental interest in preventing its repetition.[14] *Coker v. Georgia*, 433 U. S. 584, 597 (1977). Thus, having concluded that Hunt

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13 The introducer of this legislation, Senator Herbert Duis, argued in floor debate: "So many times these crimes are committed while out on bail. I think that you will find that this is very, very prevalent". E10 (Legislative History of LB 553) 08925. He had earlier stated in committee hearing: "I sincerely am trying my best to protect the victim. The object here is to try and stop the crime before it's been committed. Or, if a crime is committed or the possibility of being in a position to commit a crime that was about to be committed when they were first taken into custody". He added that the crime covered by the legislation was rape, which had been redefined as sexual assault. Id. at 25-26. See Neb. Rev. Stat. #28-319(a) (Reissue of 1979) and #28-408 (Rev. Stat. Supp. 1974). The chief opponent of the legislation, Senator Chambers, also acknowledged that the intent of the legislation was preventive detention. E10 (Legislative History of LB 553) 12, 15.

14 Hunt does not however concede that preventive pretrial detention is a legitimate government objective. The Court of Appeals below decided, and Eugene Hunt agrees, that it is unnecessary in this case to reach the important and unresolved constitutional question whether a denial of pretrial bail based on a finding of a defendant's dangerousness is constitutionally permissible, because "the Nebraska procedures provide for no inquiry into the dangerousness of the individual, and no such finding appears in the record of this case". *Hunt v. Roth*, 648 F. 2d 1148, 1164 (8th Cir. 1981). The ultimate resolution of the preventive detention issue would appear to depend upon whether this Court eventually characterizes pretrial detention as punishment, a question reserved by *Bell v. Wolfish*, 441 U. S. 520, 534 n. 15 (1979).

has a fundamental right or otherwise constitutionally-protected interest in pretrial liberty, and that Nebraska has an important interest in deterring repeated commission of rapes, the central remaining issue is whether the means chosen by the State to promote its interest, denial of bail to all persons charged with rape where the proof is evident or presumption great, is substantially related to the achievement of its objective. *Craig v. Boren*, 429 U. S. 190, 197 (1976). Hunt submits that it is not.

The intermediate scrutiny technique of demanding close fit has been applied, for example, in *Craig v. Boren*, 429 U.S. 190, 202 (1976) to invalidate a rule allowing the sale of beer to 18-to-20 year old females but denying the same privilege to the same age group of males based on the Court's finding that statistics reflecting a drunk driving arrest rate of .18% for females and 2% for males established "an unduly tenuous 'fit'" to justify the classification; in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n. 20 (1976), indicating that while the total prohibition here of alien employment was unconstitutional, "citizenship could be required as a qualification for appropriately defined classes of positions"; and in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 n. 13 (1974), suggesting that while due process rendered invalid the challenged rule that pregnant teachers must take maternity leave after the fourth month of pregnancy, "maternity leave regulations requiring a termination of employment at some firm date during the last few weeks of pregnancy" might be permissible.

In order for a defendant to be denied bail under the challenged 1978 Nebraska scheme, only two conditions need be met: (1) he must be charged with forcible first-degree sexual assault (hereinafter sometimes called "rape"), and (2) the proof must be evident or the pre-

sumption great. For the first of these two conditions to be found perfectly tailored to the legislative purpose of preventing repetition of the covered sex crime, it would be necessary to conclude that all persons charged with that offense will commit it while free on bail. Although such perfect fit between objective and means is not required by intermediate scrutiny, the State must still demonstrate a "substantial relation" between them.

In this case, the substantial relation requirement should at least demand a showing that a significant number, if not most, accused rapists can reasonably be expected to commit rape, during pretrial release. What evidence is there to support such a showing? The legislative history and record in this case contain none other than the one naked assertion of the challenged amendment's introducer. See footnote 13, supra. What little empirical data on the subject is available outside the record refutes the legislative assumption that accused rapists commit the same crime if freed on pretrial bail. One leading study of bail crime found that not one defendant charged with sexual assault was re-arrested for the same crime during pretrial release. National Bureau of Standards, *Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study* 168 (1970).[15] Another survey could find no correlation between the nature of a first offense and the type or severity of a second crime committed on bail. Note, *Preventive Detention: An Empirical Analysis*, 6 Harv. C.R.-C.L. L. Rev. 289, 342 (1971).

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15 Mr. Chief Justice Burger and others have noted the paucity of and need for more empirical data concerning the extent and other details of bail crime. W. Burger, *Annual Report on the State of the Judiciary—1980*, 66 A.B.A.J. 295, 299 (1980); W. Burger *The State of the Federal Judiciary 1979*, 65 A.B.A.J. 358, 362 (1979); Comment, *Forcible Rape and the Right to Bail*, 17 San Diego L. Rev. 1061, 1086 (1980).

It has been suggested that legislation like Nebraska's 1978 bail amendment may withstand intermediate scrutiny based upon the literature reflecting general criminal history and recidivism rates of convicted rapists. Comment, *Forcible Rape and the Right to Bail,* 17 San Diego L. Rev. 1061, 1086-87 (1980). But even assuming that *some convicted* rapists have at some time in the past, committed, or will at some indefinite time in the future again commit another rape, such data do not support Nebraska's assumption in this case that *a significant number of* defendants merely *charged* with rape will commit another rape *during the limited period while free on pretrial bail.*

It has also been argued that by further conditioning a denial of bail upon a finding that the "proof is evident or the presumption great", Nebraska's 1978 bail amendment is saved from a finding of unconstitutionality. *Id.* at 1087. See also *Parker v. Roth,* 202 Neb. 850, 278 N. W. 2d 106, 115 (1979). Assuming that this language embodied a requirement that the State establish a high probability of the defendant's guilt, it would not satisfy the "substantial relationship" test of intermediate scrutiny because neither logic, Nebraska legislative history, the record in this case, nor the few empirical studies of bail crime discussed above will support a conclusion that even a defendant charged with rape *who is probably guilty of it* presents any risk of committing rape *while free on pretrial bail.*

Moreover, the burden "proof evident or presumption great" is not defined by the Nebraska Constitution, statutes, or case law, has been assigned many different meanings by different courts, and is therefore arguably unconstitutionally vague. In order not to be declared void for vagueness, legislative language or interpretations of

it must contain ascertainable standards to guide its enforcement. *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89-92 (1921). As noted, Nebraska has in no way defined this burden. The majority rule in other jurisdictions is that a charge is prima facie evidence that the "proof is evident or the presumption great", thus shifting the burden to the defendant to introduce rebuttal evidence. One minority definition is that the charge creates an irrebuttable presumption of guilt. Another is that the state bears the burden of establishing that the defendant will probably be convicted of the offense charged. For a discussion of these various definitions, see J. Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Wis. L. Rev. 441, 444-46 (1978). Nor has this Court recognized or defined the Nebraska standard of proof. See *Addington v. Texas*, 441 U.S. 418, 423 (1979), noting and defining the "preponderance", "clear and convincing", and "reasonable doubt" burdens.

Thus left with no guidance as to its meaning, this Court and those charged with enforcing the Nebraska burden "proof evident or presumption great" must "necessarily guess at (its) meaning and differ as to its application". *Connolly v. General Construction Co.*, 269 U.S. 385, 391 (1926). The inability of Nebraska's trial courts to apply this standard to deny bail only to those defendants who are probably guilty of rape is graphically depicted in the trial exhibit reflecting that of 20 defendants denied bail whose cases had been disposed of during the first year after passage of the 1978 bail amendment, only one was convicted of the original nonbailable crime. J.A. 7-11.[16]

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16 Senator Chambers, chief opponent of the 1978 bail amendment, warned during committee hearings and floor debate

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Because the means chosen by Nebraska to promote its objective of preventing repetition of forcible first-degree sexual assault is not tailored to fit that objective and thereby sweeps too broadly by denying the fundamental interest in pretrial liberty of so many defendants who would not commit that offense if released on bail, the 1978 Nebraska bail amendment should be struck down as violative of the Fourteenth Amendment. In the language of Mr. Justice Harlan's dissent in *Poe v. Ullman*, 367 U. S. 497, 543 (1961), it amounts to an "arbitrary imposition and purposeless restraint."

C. By denying bail to all defendants merely charged with rape and not permitting Eugene Hunt and other individual defendants the opportunity to establish that they are not among the covered class of those who would commit rape while free on bail, the 1978 Nebraska bail amendment imposes an unconstitutional irrebuttable presumption.

The irrebuttable presumption doctrine is another intermediate scrutiny technique which permits governments to promote important interests through per se rules, but attempts to relieve their harsh general application by requiring that individuals, whose own interests may be infringed, be allowed to show that they are exceptions to the rules. For example, Chief Justice Stone, concurring in *Skinner v. Oklahoma*, 316 U. S. 535, 544 (1942) in invalidating a law requiring sterilization of certain habitual criminal asserted that one constitutional defect in the law was that it left the entire disadvantaged class "without opportunity to (each) individual to show that his (was) not the type of case which would justify resort to it".

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that the lack of definition of this standard of proof constituted a flaw in the law. E10 (Legislative History of LB 553) 15, 19, 08922.

Since *Skinner*, the Court has invalidated numerous laws found to create similar irrebuttable presumptions. As additional examples, see *Carrington v. Rash*, 380 U. S. 89, 96 (1965), invalidating a voting prohibition for military personnel because of the unfair irrebuttable presumption that they could never qualify as bona fide residents of the counties where they were stationed; *United States v. Brown*, 381 U. S. 437, 454 n. 29 (1965), striking down as a bill of attainder a federal statute barring all Communist Party members from serving as labor union officers because the law created an irrebuttable presumption that all Communists presented a threat, instead of leaving to other tribunals the task of sifting the harmless from the dangerous; *Shapiro v. Thompson*, 394 U. S. 618, 631 (1969), declaring unconstitutional a one-year waiting period for new residents applying for welfare because of the "nonrebuttable presumptions" that all new residents had traveled to the state to take advantage of its generous welfare benefits; *Bell v. Burson*, 402 U. S. 535 (1971), requiring an opportunity for a driver's licensee about to be suspended for lack of financial responsibility after an accident to offer evidence of absence of liability to avoid suspension; *Stanley v. Illinois*, 405 U. S. 645 (1972), mandating that an unwed father be afforded an opportunity to establish his fitness as a parent in a custody action; *Vlandis v. Kline*, 412 U. S. 441 (1973), determining that a student applying to a university from another state but requesting reduced tuition as a resident must be given a chance to prove his residence; *Cleveland Board of Education v. LaFleur*, 414 U. S. 632 (1974); requiring that a public school teacher beyond the fourth month of pregnancy be given the opportunity to demonstrate her ability to continue teaching; and *Woodson v. North Carolina*, 428 U. S. 280, 304 (1976), declaring a mandatory

death penalty unconstitutional because it treated "all persons convicted of a designated offense not as uniquely human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death".[17]

Likewise, Eugene Hunt agrees with the Court of Appeals that the 1978 Nebraska bail amendment which is the subject of this appeal, in providing "for no inquiry into the dangerousness of the individual", requiring no findings of dangerousness, and instead making "a legislative determination that an entire class of accused persons is not entitled to bail . . . has created an (unconstitutional) irrebuttable presumption that every individual charged with this offense . . . is too dangerous to be granted release". *Hunt v. Roth*, 648 F. 2d 1148, 1164 (8th Cir. 1981).

The State however now argues that there is no irrebuttable presumption because a trial judge retains the "discretion to determine whether the proof is evident or the presumption great or to grant bail even if he so finds". Appellant's Brief on the Merits 31. Eugene Hunt has already conceded that a Nebraska judge does have discretion in deciding whether the "proof is evident or presumption great". In fact, as already discussed, this is one of the fatal defects in the law because in the absence of any definition of this standard to guide trial judges in its application, they have succeeded in locking up without bail 19 defendants who have been determined to be not guilty of the nonbailable offense for every one de-

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17 See as well the earlier statement of Mr. Justice Murphy: "To . . . justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for the deprivation of rights". *Korematsu v. United States*, 323 U. S. 214, 240 (1944) (Murphy, J., dissenting).

fendant who was convicted of it. See footnote 16 and the accompanying text, supra. As for the State's contention that there is no irrebuttable presumption because trial judges have discretion to grant bail even after finding that the "proof is evident or the presumption great", the State's brief cites no authority in support of this claim, and what authority there is clearly refutes it.[18]

It is thus clear that by condemning all defendants merely charged with rape to pretrial detention upon satisfaction of a meaningless burden of proof, by providing for no inquiry into individual dangerousness, and by denying defendants the opportunity to rebut the assump-

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18 Chief Justice Krivosha's opinion of the Court in *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106, 113 (1979) stated in relevant part:

> It should be clearly recognized that the 1978 bail amendment does not *prohibit* bail in every case where an individual is charged with a sexual offense . . . In order for one so charged to be *ineligible* for bail, it must appear to the trial court that either the proof of the charge is evident or the presumption great. In any instance in which the court is not convinced that either the proof is evident or the presumption great, then the court is not *prohibited* from granting bail . . .
>
> We are therefore left with the question of whether the Legislature in the first instance, and the people thereafter, acted rationally and reasonably in concluding that where the proof was evident or the presumption great that an individual had committed a sexual offense . . ., *such person should not be free on bail pending trial.* (Emphasis added.)

An earlier Nebraska Attorney General's opinion requested by the legislation's introducer, Senator Duis, while it was pending, agreed: "We have concluded that a person charged with a sexual offense after such an amendment could still be admitted to bail *unless* the court found that proof was evident or the presumption was great that there had been penetration by force or against the will of the victim". E10 (Legislative History of LB 553) 4th page from the end (emphasis added).

tion upon which their imprisonment is based (that they will commit rape if released on bail), the State of Nebraska has created an unconstitutional irrebuttable presumption.

D. Numerous legislative alternatives which are less restrictive of the individual interest in pretrial liberty than Nebraska's 1978 bail amendment are available to promote its objective.

We have already considered the relative importance of individual defendants' interests in pretrial liberty on the one hand, and Nebraska's interest in preventing repetition of serious sex offenses while they remain free on bail on the other. We have also determined the grave risk, if not certainty, of erroneous deprivations of these individual interests through use of the procedures required under the 1978 Nebraska bail amendment.[19] In order to conclude this analysis, we only need consider whether practical substitute alternatives are available to accomplish Nebraska's interest without the grievous loss of individual liberty resulting from its current legislative choice. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

A review of the legislative alternatives selected by other jurisdictions to promote similar objectives may offer

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19 In addition to the bail standards contained in the challenged 1978 bail amendment to Neb. Const. Art. I, #9, Nebraska statutes supplementing it generally contain fairly common "bail reform" provisions mandating release under the least restrictive conditions necessary only to reasonably assure a defendant's appearance, and permitting a defendant to obtain a judicial review, with the assistance of counsel, of conditions which prevent his release for more than 24 hours. Neb. Rev. Stat. #29-901 to 29-901.04. However, all bail proceedings are summary matters to which the rules of evidence are inapplicable. Neb. Rev. Stat. #27-1101(4)(b). The bail review hearing in this case is typical of such Nebraska proceedings. See J.A. 12-16.

"models" of less restrictive choices available to Nebraska. In citing this legislation, Eugene Hunt does not wish to suggest that all or any of it could withstand constitutional scrutiny, but only to demonstrate the availability of less restrictive alternatives.

As previously noted, since 1970 five states, including Nebraska, and the District of Columbia as well, have adopted various forms of preventive detention legislation. See the text following footnote 6, supra. In addition to denying bail for capital crimes, Arizona and Utah permit bail to be denied to individual defendants charged with felonies alleged to have been committed while they are free on bail for other felonies, where there is specified proof of guilt of the second crime. Utah extends this denial to defendants charged with felonies while they are on probation or parole. Ariz. Const. Art. 2 #22; Utah Const. Art. I #8. Texas and Michigan have adopted the Arizona model, but generally add to it provisions for the denial of bail to certain habitual offenders. Michigan alone permits denial of bail on initial charges of specified violent felonies, but allows a defendant to exempt himself from such denial by adducing evidence that he is "not likely to flee or present a danger to any other person". Both Texas and Michigan place maximum time limits of 60 and 90 days respectively on the period during which bail may be denied, and Texas affords to the accused an expedited right of appeal. Mich. Const. Art. I #15; Tex. Const. Art. 1, #11-11a. The District of Columbia has the only remaining preventive detention legislation, which is the most complex and provides, among other features, requirements for proof of individual guilt, dangerousness, multiple procedural safeguards, and a 60 day maximum period of detention. D. C. Code 1973, #23-1322.

Comparing these preventive detention laws to Nebraska's 1978 bail amendment, it is clear that unlike Nebraska's, all of the others focus to a much greater degree on the individual dangerous propensities of defendants, either by requiring proof of multiple prior *convictions* of serious crimes, demanding evidence of the commission of a serious crime during a period of pretrial release, or at least by permitting the defendant to rebut a legal presumption of his dangerousness. The majority place time limits on pretrial detention, and some provide various other procedural safeguards, all of which are absent from the 1978 Nebraska bail amendment and related statutes.[20]

Because these six other American jurisdictions have implemented various preventive detention laws which constitute living models and proof of the availability of practical and less restrictive alternatives than Nebraska's choice, and which in fact serve to highlight the unnecessary overinclusiveness of Nebraska's law, Eugene Hunt further urges the Court to find the challenged 1978 Nebraska bail amendment unconstitutional.

IV. This case presents to the Court a classic example of the tyranny of a democratic majority over an unpopular minority whose interests are protected by Bill of Rights.

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20 Models for less restrictive preventive detention laws than Nebraska's can be found other than in existing legislation. For example, Mr. Chief Justice Burger recently suggested that determinations of dangerousness should be "based on a combination of the evidence then available and the defendant's past record, to deter crime while on bail". Unlike Nebraska's ineffective speedy trial statutes, (see footnote 11, supra), he further recommended "trial within weeks of arrest for most cases . . . " W. Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 67 A.B.A.J. 290 (1981). For similar and additional recent suggestions, see *United States v. Edwards*, D. C. App., 430 A. 2d 1321, 1372 (1981) (Mack, J. dissenting).

In his treatise on the American system of government, written nearly 150 years ago, Alexis de Toqueville observed:

> Another tendency, which is extremely natural to democratic nations and extremely dangerous, is that which leads them to despise and undervalue the rights of private persons. . . . (Such) rights . . . amongst democratic nations are commonly of small importance, of recent growth, and extremely precarious; the consequence is, that they are often sacrificed without regret, and almost always violated without remorse.

A. de Toqueville, *Democracy in America* 310 (R. Hefner, ed. 1956).

In proposing the Bill of Rights, Madison argued that it must be directed at the legislative branch which was the most powerful, least controlled, and most likely to be abused, but he added that he saw an even greater danger in abuse of power by the people themselves:

> The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of government, but in the body of the people, operating by the majority against the minority.

I. Brant, *The Bill of Rights* 54 (1965) (quoting James Madison). The fact that half of the numbered amendments of the Bill of Rights, and more than half of their total language, establish rights of criminal defendants can only reflect the framers' belief that this class constituted the most despised of minorities, the most likely to be oppressed by government and the majority of the people, and was therefore most in need of constitutional protection.

According to Senator Duis, the introducer of the 1978 Nebraska bail amendment challenged in this case, the legislation was his response to demands from his constituents who had been shocked by some unusual "heinous crimes" in his district and to a Nebraska newspaper's public opinion poll which drew a 96 percent affirmative response to a question asking whether bail should be denied to defendants charged with serious sex crimes. E10 (Legislative History of LB 553) 1-2. The vigilante spirit generated by these crimes and which culminated in the enactment of the 1978 bail amendment by more than an 80% popular vote was eloquently described by Senator Chambers, the amendment's chief opponent:

> I don't know what happened to Sell (the defendant responsible for the "heinous crimes" referred to by Senator Duis) when he was young, but I know if he had done to my wife, or my mother, or my sister, or my daughter what he did out there, and I admit it, I would probably feel like taking his head off. But I also admit that that is not my customary mode of thought. When we enact laws, and when we tamper with the Constitution, that tampering should be done by sane, calm, deliberative minds and not by those who, if they were not afraid, would put a pillow case on, a bed sheet, take a lighted torch, a bullwhip and become night riders and take somebody and put a rope around their neck and jerk them off the ground on the limb of a tree. That is the kind of spirit abroad in the land when one of these terrible crimes are committed, and the ones who are so upset by that crime will then ask the state to engage in the same kind of conduct they are condemning.

E10 (Legislative History of LB 553) 14.

Eugene Hunt submits that this case presents to this Court a supreme test of the Bill of Rights and the rule of law in the face of a challenge by an irrational ma-

jority of the people of the State of Nebraska who, but for the intervention of the Court of Appeals below and this Court of last resort, would deny the guaranteed rights of an unpopular minority. As Mr. Chief Justice Burger recently stated, the "war on crime" will not be won "by abandoning the historic guarantees of the Bill of Rights". W. Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 67 A. B. A. J. 290, 292 (1981). See also, Mr. Chief Justice Burger's speech in *Law Day at the White House*, 65 A. B. A. J. 929, 932 (1979). This Court has not failed in the past to strike down similarly unconstitutional majority encroachments on protected minority rights, and the result should be no different in this case. See, for example, *Reitman v. Mulkey*, 387 U. S. 369 (1967).

CONCLUSION

For the foregoing reasons, Eugene Hunt urges the Court to affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

BENNETT G. HORNSTEIN
Douglas County Public Defender's Office
306 Douglas County Hall of Justice
Omaha, Nebraska 68183
Telephone: (402) 444-7683 or 391-3712
Counsel for Appellee